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# IN THE
# COURT OF APPEALS OF INDIANA

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| PAUL LEWIS, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 53A04-0609-CR-511 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Marc R. Kellams, Judge
Cause No. 53C02-0605-FC-214

**March 19, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Paul Lewis appeals his conviction for Battery,[1] a class C felony, claiming insufficiency of the evidence. Alternatively, Lewis argues that his conviction must be reversed because the trial court erred in denying his motion for mistrial when the jury foreman signed—and then tore up—a verdict form stating that Lewis was not guilty of the offense. Finding no error, we affirm the judgment of the trial court.

FACTS

During the early morning hours of May 6, 2006, Lewis and his girlfriend, Rachel Pruitt, were at Anthony Rucker's apartment in Bloomington. At some point, Pruitt walked into one of the bedrooms to plug in her cell phone. Lewis followed Pruitt and grabbed her by the hair. Lewis started banging Pruitt's head against the wall, placed his hands around her throat, and squeezed until she "started seeing black." Tr. p. 136. After hearing the commotion, Rucker walked into the bedroom and saw Lewis choking Pruitt. Lewis was also banging Pruitt's head against the wall, and Rucker could feel the vibrations through his feet. Pruitt's knees were buckling, her mouth was turning "white and bluish," and she was unable to speak because of the choking. Id. at 91. Although Rucker was able to initially pull Lewis away, Lewis again approached Pruitt and struck her in the face.

While Rucker initially called 911, he hung up because he did not want to get Lewis or Pruitt in trouble. However, Bloomington Police Officer Joseph Henry was dispatched to the scene in response to the 911 hang-up call. When Officer Henry arrived, he spoke with Rucker, who informed him that a female had just been battered in his apartment. At that

[1] Ind. Code § 35-42-2-1.

point, Officer Henry saw Pruitt looking out of an upstairs window and crying. Pruitt came downstairs but was hysterical and crying so hard that she was unable to speak. After several minutes, Pruitt told Officer Henry that Lewis had grabbed her by the hair, slammed her head into the wall multiple times, grabbed her by the throat with both hands, and choked her. She also told Officer Henry that Lewis had slapped her in the face several times. Pruitt had red marks on her chest and around her neck.

After Pruitt complained of a sore head and neck, Officer Henry drove her to the Bloomington Hospital emergency room. Dr. John Ray examined Pruitt and diagnosed her with a concussion, bruising, and muscle strain. Pruitt scored her pain as a "nine" on a scale of one to ten, with ten being the most severe pain. Id. at 165, 183-84. When considering the nature and severity of Pruitt's injuries, Dr. Ray did not believe that Pruitt had exaggerated her pain level.

As a result of this incident, Lewis was charged with class C felony battery and intimidation as a class D felony. The State also alleged Lewis to be a habitual offender based on his prior felony convictions for burglary in 1987 and battery in 2000. At the conclusion of a jury trial on July 6, 2006, Lewis was found guilty on both counts. Lewis was also found to be a habitual offender. The verdicts were recited in open court and all twelve jurors, by a show of hands, indicated that these were the verdicts they had reached.

After the jury was excused from service, the trial judge directed the bailiff to the jury room to retrieve the unsigned "not guilty" verdict forms. Id. at 277-78. The bailiff found

that one of the forms had been dated but not signed. The other form was dated and signed, but it had been torn up into several pieces and placed in a trashcan. After consulting with the parties, the trial court, prosecutor, and defense counsel engaged in a conference call with the jury foreman to inquire about the "not guilty" verdict form that had been singed, torn up, and discarded. The foreman explained that he had mistakenly signed the wrong form and, after one of the other jurors had pointed out the mistake, the foreman had torn up and discarded that form. Furthermore, the foreman stated that the jury had never reached a not guilty verdict. The foreman subsequently executed an affidavit to this effect, which the trial court made part of the record. While Lewis made no objection to this procedure, he moved for a mistrial because the jurors had failed to follow the trial court's instructions to sign only one form. The trial court denied the motion, finding that the other form had been signed in error and that the jurors had agreed unanimously on the guilty verdict. Thereafter, Lewis was sentenced to an aggregate term of incarceration of twenty-three years. Lewis now appeals.

## DISCUSSION AND DECISION

### I. Sufficiency of the Evidence

Lewis argues that there was insufficient evidence to convict him of class C felony battery because Pruitt's injuries did not amount to a "serious bodily injury" pursuant to Indiana Code section 35-42-2-1(a)(3).[2] Therefore, Lewis maintains that his conviction for that offense must be vacated.

[2] Indiana Code section 35-42-2-1(a)(3) provides "[a] person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is . . . a Class C felony if it results in serious bodily injury to any other person . . . ."

We initially note that the standard of review for sufficiency claims is well settled. In addressing Lewis's challenge, we neither reweigh the evidence nor reassess the credibility of witnesses. Sanders v. State, 704 N.E.2d 119, 123 (Ind. 1999). Instead, we consider the evidence most favorable to the verdict and draw all reasonable inferences that support the ruling below. Id. We affirm the conviction if there is probative evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. O'Connell v. State, 742 N.E.2d 943, 949 (Ind. 2001).

For purposes of a class C felony battery conviction, "serious bodily injury" means "bodily injury that creates a substantial risk of death or that causes: (1) serious permanent disfigurement; (2) unconsciousness; (3) extreme pain; (4) permanent or protracted loss or impairment of the function of a bodily member or organ; or (5) loss of a fetus." Ind. Code § 35-41-1-25. Whether bodily injury is "serious" is a question of degree and, therefore, appropriately reserved for the finder of fact. Sutton v. State, 714 N.E.2d 694, 697 (Ind. Ct. App. 1999).

In this case, both Pruitt and Rucker testified that her injuries resulted from Lewis banging her head against the wall multiple times and choking her until she could not breathe. Tr. p. 89-91, 136-37. When Officer Henry arrived, Pruitt complained to him of head and neck pain and had visible red marks on her chest and neck. Id. at 36-37; Ex. 2, 3. Pruitt also testified that her head hurt "really bad" and that it felt like the pain she had suffered when she had been in an automobile accident and her head struck the windshield. Tr. p. 147. Pruitt stated that her pain level was a "nine" and indicated that her pain was "severe." Id. at 183.

Dr. Ray, an experienced emergency room physician who treated Pruitt, testified that he had no doubts about the accuracy of Pruitt's description of her pain. Pruitt was also given a prescription for pain, and the jury observed photographs of Pruitt's injuries. Id. at 147, 165, 186; Ex. 2-4.

From this evidence, the jury could have reasonably inferred that Pruitt received "serious bodily injury" as defined by statute. In essence, Lewis's argument is merely an invitation for us to reweigh the evidence and assess the credibility of witnesses—a practice in which we do not engage as the reviewing court. Sanders, 704 N.E.2d at 123. Thus, we conclude that the evidence was sufficient to support Lewis's conviction.

## II. Motion for Mistrial

Lewis also contends that the trial court erred in denying his motion for a mistrial. Specifically, Lewis maintains that a mistrial was warranted because "the jury did not follow the court's instruction to only return one verdict on each count." Appellant's Br. p. 20.

On appeal, the trial court's discretion in determining whether to grant a mistrial is afforded great deference because the judge is in the best position to gauge the surrounding circumstances of an event and its impact on the jury. McManus v. State, 814 N.E.2d 253, 260 (Ind. 2004). We therefore review the trial court's decision solely for abuse of discretion. Id. After all, a mistrial is an extreme remedy that is only justified when other remedial measures are insufficient to rectify the situation. Id. To prevail on appeal from the denial of a motion for mistrial, the defendant must establish that the questioned conduct "was so prejudicial and inflammatory that he was placed in a position of grave peril to which he

should not have been subjected." Mickens v. State, 742 N.E.2d 927, 929 (Ind. 2001). The gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury's decision, not the impropriety of the conduct. Id.

At the outset, we note that the jury was not considering matters that had not been placed into evidence and that Lewis is not alleging that the jury had considered any improper outside influences in arriving at the verdict. The trial court instructed the jurors that they were to "return one signed verdict for each Count of the information." Tr. p. 249. In essence, that is precisely what the jury did. Even though the foreman mistakenly signed one of the forms and did not return that form to the trial court, we do not see how such action or inaction amounted either to misconduct or to a violation of the trial court's instructions.

Additionally, there is no showing that Lewis was placed in any peril—much less "grave peril"—as a result of the jury foreman's actions. Indeed, the record establishes that the jury found Lewis guilty of the charged offenses, that the foreman had initially signed the incorrect verdict form and discarded it, and that all of the jurors affirmatively indicated by a show of hands that they had reached a guilty verdict. Lewis does not dispute these circumstances, nor does he contend that the jury ever found him not guilty of the charged offense. As a result, we conclude that the trial court properly denied the motion for mistrial.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.